No. 13862

# United States Court of Appeals
## For the Ninth Circuit

NELSE MORTENSEN & CO., INC., *Appellant,*

— VS. —

KENNETH S. TREADWELL, Trustee of Puget Sound Products Co., a corporation, Debtor, and SEATTLE ASSOCIATION OF CREDIT MEN, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

## BRIEF OF APPELLANT



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Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

## BRIEF OF APPELLANT

### JURISDICTION

The jurisdiction of the United States District Court for the Western District of Washington, Northern Division, in this matter, was acquired by the filing of a "Petition for Relief" under the provisions of Chapter X of the Bankruptcy Act, by Puget Sound Products Co., a corporation, on February 2, 1951, in accordance with the provisions of Title 11, U.S.C.A., Sec. 526 (Tr. 3 to 10, inc.), and the entry of order on February 3, 1951, approving such petition, pursuant to Title 11, U.S.C.A., Sec. 541 (Tr. 11 to 14, inc.). Thereby, the District Court acquired exclusive jurisdiction of the Puget Sound Products Co. and its property wherever located, by virtue of Title 11, U.S.C.A., Sections 511 and 549.

On January 21, 1952, the appellee, Kenneth S. Treadwell, was appointed as Trustee in Bankruptcy of the Puget Sound Products Co. (Tr. 15, 16) and duly qualified as such Trustee.

The order of February 3, 1951 (Tr. 11 to 14, inc.) referred all matters arising in the proceeding, except such matters as are reserved to the Judge by the provisions of the Bankruptcy Act, to Van C. Griffin, Referee in Bankruptcy, as Referee-Special Master, to determine and enter orders thereon.

One of the proceedings involved on this appeal was instituted by the Trustee for Puget Sound Products Co. on October 3, 1952, by the filing with the Referee-Special Master of a petition for an Order to Show Cause directed to the appellant, Nelse Mortensen & Co., Inc. (Tr. 17, 18) requiring it to appear and show cause why an order should not be entered decreeing that all property listed by the Trustee in the inventory filed by him is free and clear of any right, title, claim or interest of the appellant. An Order to Show Cause was issued on the same day (Tr. 19, 20), and the appellant, on October 29, 1952, filed its answer claiming title to certain property which it alleged constituted fixtures and appurtenances to the real estate at Houghton, Washington, then owned by appellant and which had been formerly owned by Puget Sound Products Co. (Tr. 20 to 22, inc.).

The jurisdiction to hear this proceeding was conferred on the bankruptcy court by Title 11, U.S.C.A., Sec. 11(6) and Sec. 11(7).

The appellee, Seattle Association of Credit Men,

Inc., which held a chattel mortgage upon the personal property of Puget Sound Products Co., filed a reply to the claim of appellant (Tr. 23 to 26, inc.).

On January 12, 1953, the Referee-Special Master entered his Findings of Fact and Conclusions of Law (Tr. 25 to 45, inc.) and on the same day entered his "Order on Order to Show Cause" (Tr. 46) adjudging that all of the property listed in the trustee's inventory is free and clear of any right, title and interest of the appellant, except the fire prevention system which it adjudged to be the property of appellant.

The other proceeding involved on this appeal is the claim of Nelse Mortensen & Co., Inc., against the Trustee, for reasonable rental for the use and occupancy of the real estate owned by appellant, from the date it acquired title to the real estate, November 5, 1951, to the 1st day of September, 1952. No pleadings or petitions were filed in connection with this claim, but it was heard by the Referee-Special Master and determined in a summary manner, with the claimant and the Trustee appearing generally and submitting the matter to the bankruptcy court for determination. The claim was one arising in connection with the administration of the bankrupt's estate. The jurisdiction to hear this claim for rent is conferred by Title 11, U.S. C.A., Sec. 11(7).

On January 12, 1953, the Referee-Special Master entered his Findings of Fact and Conclusions of Law on the application for allowance of rent (Tr. 47 to 49, inc.) and on the same day entered an "Order on Application of Nelse Mortensen & Co., Inc., for Allow-

ance of Reasonable Rent" (Tr. 50), denying and disallowing the claim.

On January 16, 1953, the appellant, Nelse Mortensen & Co., Inc., filed its Petition for Review of both the "Order on Order to Show Cause" and the "Order on Application of Nelse Mortensen & Co., Inc., for Allowance of Reasonable Rent," in accordance with the provisions of Title 11, U.S.C.A., Sec. 67(c) (Tr. 51 to 53, inc.). As required by Title 11, U.S.C.A., Sec. 67(a)(8), the Referee prepared and transmitted to the District Court his "Referee's Certificate on Review—Re Mortensen's Claim of Ownership" (Tr. 54 to 56), and his "Referee's Certificate on Review—Re Mortensen's Claim for Storage or Rent" (Tr. 56 to 59), together with a statement of the questions presented, the findings and orders thereon, the petition for review, and transcript of the evidence, and all exhibits. Both of said certificates on review were filed on February 9th, 1953.

On April 6, 1953, the Judge of the District Court entered an "Order on Review of 'Order on Order to Show Cause Directed to: Nelse Mortensen & Co., Inc.'" affirming the order entered by the Referee-Special Master on January 12, 1953 (Tr. 59, 60).

On the same date an "Order on Review of 'Order on Application of Nelse Mortensen & Co., Inc., for Reasonable Rent'" was also entered by the Judge of the District Court, affirming the order entered by the Referee-Special Master (Tr. 61, 62).

Within thirty days thereafter the appellant filed his notice of appeal to the United States Court of Appeals

from both of the said orders of the District Court (Tr. 62), and its cost bond on appeal (Tr. 63, 64).

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is invoked under Title 28, U.S.C.A., Sec. 1291, and Title 11, U.S.C.A., Sec. 47(a).

## STATEMENT OF THE CASE

There are two separate matters involved upon this appeal. The first is the question of the ownership of certain property, which the appellant claims constitutes fixtures and a part of the real estate belonging to appellant. The other is the amount of rent, if any, to which appellant is entitled on account of the use and occupancy of its real estate by the Trustee of Puget Sound Products Co. during the period from November 5, 1951, to September 1, 1952. The facts relative to these two matters will be stated separately.

### (1) Appellant's Claim of Ownership

On June 19, 1941, the Defense Plant Corporation, an agency of the United States of America, acquired title to the real estate involved in this proceeding (Exhibit 1, Tr. 79, 80).

During 1941 or 1942 the present building was constructed on this property by the Defense Plant Corporation (Tr. 208), to be used as a "steel fabricating shop." At the same time, as a part of the building, and for the more convenient use thereof as a fabricating shop, overhead bridge cranes were installed in the building. The crane posts and rails and bracing were constructed as part of the original plans (Exhibits 12 to 15, Tr. 209); the cranes were constructed for

the job and installed in the building (Tr. 209 to 212) during the original construction; and the tracks for the cranes were set on reinforced concrete foundations specially constructed (Tr. 211). A transformer vault was also constructed for the building (Tr. 211) and electric wiring was installed as part of the original contract (Tr. 213). The overhead sprinkler system was also installed at the time the building was built (Tr. 213).

On December 16, 1947, the real estate was deeded to Puget Sound Products Company (Exhibit 3, Tr. 83 to 86, incl.), and on the same day a Purchase Money Mortgage was executed by the Puget Sound Products Company to the Reconstruction Finance Corporation (Exhibit 2, 81, 82), covering the real estate "together with the building, structures and improvements located thereon."

At the time of the purchase of the property by the Puget Sound Products Company, the two cranes involved herein, the electrical power system, the auxiliary fire pump used in connection with the fire protection system on the docks, the compressor used for the overhead fire protection system, and the Trumbull electric switchboard, were located upon the property, and were described and referred to in the deed of conveyance (Exhibit 3, Tr. 84, 85). The thirteen transformers were also conveyed to the Puget Sound Products Company by the same instrument, although Mr. Worth Goss, in his testimony, claimed that only one or two transformers were there at the time the property was acquired, and the others were assembled from other locations (Tr. 133, 134). In any event, it

is clear that all the transformers were either on the property at the time it was acquired, or were placed thereon immediately thereafter (Tr. 137). They are installed in the same manner that transformers are usually installed (Tr. 179), and have been in continual use (Tr. 180). If they were taken out, there would be no light or power for the building (Tr. 189), and they furnish the power for the operation of all power equipment, including the cranes (Tr. 179).

The Trumbull electric switchboard was in the property at the time it was acquired and is still in the same position (Tr. 138, 140, 141). It serves the purpose of turning on and off the power to various parts of the plant (Tr. 182), and is connected with a heavy network of wiring, mostly in conduit, under the floor, to various parts of the building (Tr. 223).

The heating system in the building was placed therein after the building was acquired by the Puget Sound Products Company, about January, 1948 (Tr. 139). It is an oil burner, connected by copper tubing to underground oil tank (Tr. 226, 227). It was fastened to the columns of the building in such a way that, when it was moved (under stipulation of the parties) to another part of the building, not all of it could be salvaged (Tr. 234, 235).

On the east side of the building is a diatherm boiler, which the building was extended in order to house (Tr. 143, 144, 226). It was installed in the building in 1948 by the Puget Sound Products Company (Tr. 146). It is set on a concrete base, in a large hole in the floor (Tr. 190, 225, 226) or pit, ten or twelve feet

deep, and is connected to a network of steam pipes (Tr. 229) and is fired with oil which reaches the boiler from underground tank through tubing which is under the floor (Tr. 230).

The auxiliary fire pump on the dock is connected with the fire protection system, and was acquired by the Puget Sound Products Company at the time the property was purchased (Exhibit 3, Tr. 84). Mr. Goss testified that it was not necessary to the use of the fire protection system, unless there should be a failure of the Kirkland water supply (Tr. 183), but Mr. Hendrickson testified that the system would not work without this pump (Tr. 220, 221) and that in his opinion the Kirkland system was not connected to the dock fire protection system (Tr. 233). In any event, the auxiliary fire pump was and still is a part of the fire protection system.

The overhead fire protection system in the building was adjudged to be a part of the building by the Referee-Special Master, but he refused to adjudge the compressor used in connection therewith to be a part of the system. The compressor is a necessary part of the fire protection system, which is controlled by air pressure in the pipes (Tr. 221, 222), and the system would not work if the compressor were not attached. The system is in the same condition now as when it was acquired by appellant (Tr. 222).

The Purchase Money Mortgage, dated December 16, 1947, in favor of the Reconstruction Finance Company (Exhibit 2, Tr. 81, 82) covering the real estate "together with the building, structures and improvements located hereon," was foreclosed in Cause No. 2479 of

the United States District Court for the Western District of Washington, Northern Division in the case of United States of America, plaintiff, v. Puget Sound Products Company, a Washington corporation, Seattle Association of Credit Men, a Washington corporation, et al., defendants. In the Amended Complaint in that case filed on June 3, 1950, and in the Findings of Fact which were signed and filed on September 5, 1950, the mortgaged property was described as the real estate "together with the buildings, structures and improvements located thereon" (Exhibit 4, Tr. 90, 104).

The Seattle Association of Credit Men, which held a mortgage upon the real estate as well as upon certain personal property, was made a defendant in the foreclosure action, and appeared therein, but failed to answer the complaint of the plaintiff, and was adjudged in default on September 5 ,1950 (Tr. 87, 100 101).

Pursuant to the decree of foreclosure, the property was sold by the United States Marshal to the United States of America, and an order was entered confirming the sale on November 15, 1950 (Tr. 117 to 119, incl.).

At the time of the foreclosure of the real estate mortgage by the United States, the Puget Sound Products Company was insolvent, or at least, was having serious financial difficulties. It had given to the Seattle Association of Credit Men a trust mortgage and a Chattel Mortgage on July 7, 1949, covering all of its real and personal property, in the amount of $80,000.00 (Exhibit 10, Tr. 168 to 172). On June 27, 1949, it had

also given a chattel mortgage to the United States Sheetwood Company, which was assigned in August, 1949, to W. L. Grill (Exhibit 18, Tr. 250 to 253).

Shortly before the time for redemption from the Marshal's sale of the real estate on foreclosure of the mortgage would expire, the appellant, Nelse Mortensen & Co., Inc., for a consideration of $750.00, purchased from the Seattle Association of Credit Men, Inc., its right to redeem the property from the Marshal's sale (Exhibit 4, Tr. 120, 121; Exhibit 3, Tr. 353, 354). Its notice of intention to redeem the property was then given, and on November 5, 1951, the appellant paid to the United States Marshal $50,710.84 for redemption of the property; and pursuant thereto the United States Marshal's Deed on Foreclosure was delivered to appellant on January 21, 1952 (Exhibit 5, Tr. 126 to 130, incl.).

**(2) Appellant's Claim for Rent**

The fabricating plant located on the property acquired by the appellant is located in a building approximately 90 feet wide and 300 feet long (Tr. 147). During the period from November 5, 1951, to September 1, 1952, more than half of the space in the building was used and occupied by the Puget Sound Products Co. and its Trustee (Tr. 269 to 271, 277, 278). The testimony shows without dispute that the reasonable value of the use of this property was $500.00 per month (Tr. 300, 307). In fact, Mr. Goss himself testified that they would be willing to pay $500.00 per month after the first six months (Tr. 371). $100.00 per month was received from Edward Heller as rental for the

laboratory space on the property, which would make the net amount which the appellant claims $400.00 per month for the ten-month period involved. The reasonableness of the claim for rent is further substantiated by the fact that a written lease was entered into effective September 1, 1952 (Exhibit 1, Tr. 271, 277) for space less than that which the Trustee occupied during most of the period, at the agreed monthly rental of $400.00.

The refusal of the Referee-Special Master to recognize and allow the claim for rent was based upon an alleged oral agreement entered into prior to the time Nelse Mortensen & Co., Inc., had acquired the property, to the effect that the Puget Sound Products Co. might have free use of the property for a period of six months (Tr. 48, 49). The circumstances which were claimed to have resulted in such an agreement were substantially as follows:

After it had filed its petition for reorganization in February, 1951 (Tr. 3 to 10, inc.), the directors of the Puget Sound Products Co., including Mr. Worth Goss, were acting as trustees for the debtor in possession of its property. It was attempting to find someone who would purchase the real estate, and who would permit it to remain in possession, at least temporarily, in order that it might try to work out some reorganization plan.

Shortly before the time for redemption from the Marshal's sale would expire, negotiations for the sale of the property were conducted with the appellant, Nelse Mortensen & Co., Inc., which was interested in

acquiring the property. Mr. Goss, on behalf of Puget Sound Products Company, offered to sell the equity of redemption in the real estate to Nelse Mortensen & Co., Inc., in return for six months' free occupancy of the premises, and to allow appellant to use any of the property not required for the operations of the Puget Sound Products Company (Tr. 194 to 197, 370, 371, 372). However, after investigation, it was found to be impossible for appellant to acquire title to the property through the Puget Sound Products Company, and the matter was dropped (Tr. 265, 311, 346, 347). The Puget Sound Products Company never, at any time, redeemed the property from the Marshal's sale, nor sold its equity of redemption, or any other property to Nelse Mortensen & Co., Inc. (Tr. 202), and all negotiations with reference to free rent for Puget Sound Products Company occurred during these preliminary negotiations, and prior to the time that appellant acquired title to the property (Tr. 379).

## STATEMENT OF POINTS TO BE URGED

1. The District Court erred in entering the "Order on Review of 'Order on Order to Show Cause Directed to Nelse Mortensen & Co., Inc.'" on April 6, 1953, wherein the petition for review of order entered January 12, 1953, by the Referee-Special Master, adjudging that all of the property described in the Trustee's inventory is free from any claim, right, title or interest of Nelse Mortensen & Co., Inc., was dismissed, and the said order of the Referee-Special Master was affirmed.

2. The District Court erred in failing to reverse the

said order of the Referee-Special Master, and to adjudge that the following described property constitutes fixtures, and is a part of the real estate belonging to the appellant, Nelse Mortensen & Co., Inc., to-wit:

a. A 10-ton bridge crane and a 15-ton bridge crane.

b. Electrical lighting and power system, including transformers, wiring and equipment.

c. Heating system.

d. Auxiliary fire pump used for and connected with fire protection system on docks.

e. Boiler located on the east side of appellant's building, together with pipes and equipment.

f. Compressor used for and connected with overhead fire protection system.

g. Trumbull electric switchboard.

3. The District Court erred in entering the "Order on Review of 'Order on Application of Nelse Mortensen & Co., Inc., for Reasonable Rent'" on April 6, 1953, wherein the petition for review of order entered by the Referee-Special Master on January 12, 1953, denying and disallowing application of Nelse Mortensen & Co., Inc. for reasonable rent, was dismissed, and the said order of the Referee-Special Master was affirmed.

4. The District Court erred in failing to reverse the said order of the Referee-Special Master, and to allow to the appellant, Nelse Mortensen & Co., Inc., reasonable rent for the property used and occupied by the Trustee herein, for the period from November 5, 1951, to September 1, 1952, at the rate of $400.00 per month, or a total of $4,000.00.

## SUMMARY OF ARGUMENT

All of the items of property above referred to were placed in the building by the owner thereof, some of them by the Defense Plant Corporation, and some of them by the Puget Sound Products Company, in order that the building might be better adapted for use as a manufacturing or fabricating plant, and with the intention of making the equipment a permanent part of the property. They constituted fixtures or improvements to the real property and became a part thereof.

When the United States of America foreclosed its mortgage upon the real estate in Cause No. 2479 of the United States District Court for the Western District of Washington, Northern Division (Tr. 87 to 119, inc.), all of these fixtures and improvements, as well as the land itself, were sold to the United States as purchaser at the Marshal's sale, subject only to right of redemption. By the Marshal's Deed on Foreclosure (Tr. 126 to 130, inc.), the appellant, Nelse Mortensen & Co., Inc., acquired the same title that the United States of America would have acquired if no redemption of the property had been made.

The chattel mortgage in favor of the respondent, Seattle Association of Credit Men, Inc. (Exhibit 10, Tr. 168 to 173) was subsequent and inferior to the mortgage of the United States upon the real estate, and by the foreclosure of the mortgage in a suit in which said respondent was a party defendant, the lien of the chattel mortgage upon any property which constituted fixtures and improvements to the real estate was extinguished.

Nor was there ever any severance of the disputed items of property from the real estate. The chattel mortgage in favor of the United States (Exhibit 9, Tr. 159 to 163) merely created a lien which *might have* resulted in a severance if the mortgage had been foreclosed, but this mortgage was paid in full (Tr. 164), and upon payment thereof the potential possibility of severance of the fixtures as a result of the chattel mortgage was terminated.

As to appellant's claim for reasonable rental for the property during the period from November 5, 1951, to September 1, 1952, the evidence is clear and undisputed that the Trustee for Puget Sound Products Co. used and occupied the portion of the property for which rental was requested during all of this time, and that the sum of $400.00 per month was the reasonable rental value of this portion of the property. The alleged agreement that the Puget Sound Products Co. was to have "free rent" for a period of six months was not established by the evidence, which conclusively showed that all conversations and negotiations in reference thereto were predicated upon the appellant's acquiring title from the Puget Sound Products Co., and that no such deal was ever consummated. Nor was there any consideration for any alleged promise to allow free rent, upon which to base a contract; and no agreement on behalf of the appellant to allow free rent was ever made. Under the evidence appellant was entitled to allowance of this rent as an expense of the administration of the estate.

## ARGUMENT AND AUTHORITIES

### I.

### The Property Claimed by Appellant Constituted Fixtures and Improvements, and Is a Part of the Real Estate.

The elements essential to establish that each and all of the items of property claimed by appellant are fixtures and a part of the real estate exist in this case. All of them are either actually annexed to the real estate or permanently installed therein, and applied to the purpose of making the building suitable for use as a manufacturing or fabricating plant; all of them were installed by the owner of the property for the purpose of making a permanent accession to the freehold. The removal of the fixtures would convert the property into a bare frame building, without light or power, without heat, and without the boilers and cranes necessary for use of the property for the purposes for which it was constructed.

The case of *Filley v. Christopher*, 39 Wash. 22, 80 Pac. 834, is a leading case in the State of Washington on the subject of what constitutes fixtures, and has been cited and followed in numerous later cases. In that case, title to the real estate had been acquired by purchase of the real estate at mortgage foreclosure sale. The Supreme Court in that case held that the furnace and boiler, piping and plumbing materials and radiators, opera chairs, drop curtains and scenery, and appliances for raising and lowering the same, and electric switch board, were a part of the real estate and passed to the purchaser at the sale upon foreclosure of a real estate mortgage. In that case, the court said:

> "The true criterion of a fixture is the united application of these requisites: (1) actual annexation to the realty, or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold."

In the case of *Cutler v. Keller*, 88 Wash. 334, 153 Pac. 15, a frame building intended for a moving picture studio was constructed on the land. It was set upon posts and was capable of removal without injury to the land. The laborers who constructed the building, and the materialmen, filed liens against the property, and contended that their liens were prior to the lien of mortgages on the real estate. In holding that the building had become a part of the real estate and that, therefore, the lien of the real estate mortgages was prior to the liens of the laborers and materialmen, the court said:

> "When buildings are placed by the absolute owner of land on which they rest, their quality of removability without injury to the freehold is not usually a factor of controlling importance as between mortgagor and mortgagee, *Rowland v. Sworts*, 17 N.Y. Supp. 399, though it may be as between landlord and tenant or licensor and licensee.
>
> "'Fully as much importance is attached to the relation of the party making the annexation to the land and the permanency and habitual character of the annexation, as is paid to the manner or form of the fastening. When the absolute owner of land, for the better use of his land, erects property upon, or attaches it to the freehold, it will go to

his heir, or pass by deed, to his grantee, and the same general rule applies between mortgagor and mortgagee, but as between landlord and tenant and licensor and licensee, this rule is relaxed, with a view to the encouragement of mechanical and agricultural pursuits.' Tiedeman, Real Property (3d ed.), p. 28, §17.

"Though the rule has become much relaxed as between landlord and tenant, especially as to the things affixed for the purposes of trade, manufacture or agriculture, the same strict rule which applies as between heirs and executors applies as between vendor and vendee, and mortgagor and mortgagee, unless excepted in express terms from the conveyance or mortgage."

The case of *Ballard v. Alaska Theatre Co.*, 93 Wash. 655, 161 Pac. 478, involved the determination of the question as to whether fixtures placed upon the property by a tenant become a part of the real estate. The Supreme Court, in that case, pointed out the distinction between the rule as applied to landlord and tenant, and the rule applicable where the fixtures are placed upon the property by the owner thereof. In that case the court said:

"In determining whether a chattel which has been anneyed to the freehold is a trade fixture or a part of the realty, the cardinal inquiry is into the intent of party making the annexation. Often there is difficulty in determining the intent, but, whatever may be the legal relation of the parties between whom the controversy is waged, when the intent is discovered it is generally controlling. The intent is not to be gathered from testimony of the actual state of the mind of the party making the annexation (*Washington Nat. Bank v. Smith*, 15

> Wash. 160, 45 Pac. 736); but is to be inferred, when not determined by an express agreement, from the nature of the article affixed, the relation and situation to the freehold of the party making the annexation, the manner of the annexation, and the purpose for which it is made. * * *
>
> "Again, a different rule obtains for determining the intent when the question arises between landlord and tenant, or licensor and licensee, than obtains when it arises between grantor and grantee, mortgagor and mortgagee, or heirs and executors. When the annexation is made by a tenant or licensor the presumption is that he did not intend to enrich the freehold, but intended to reserve title to the chattel annexed in himself, while from an annexation by the owner of the property, the presumption is the other way [Citing cases]."

In *Siegloch v. Iroquois Mining Co.*, 106 Wash. 632, 181 Pac. 51, there was involved a contract for the sale of certain mining claims which provided that in case of default the purchaser would deliver up possession of said mining claims "together with all improvements placed thereon." It will be noted that in the case at bar, the purchase money mortgage from the Puget Sound Products Company (through which Nelse Mortensen & Co., Inc., acquired title to the property) covered the real estate "together with the buildings, structures and improvements located thereon." In holding that a drill press, a pressure tank, a Sullivan drill sharpener, a Delco light plant, four galvanized iron water tanks, about 1800 feet of rails laid in place, and 1600 feet of pipe, which were more or less attached to the freehold, became a part of the real estate and passed to the own-

ers of the property on the forfeiture of the contract, the court said:

> "We think the term 'improvements,' as here used, must have a somewhat broader signification than that which is usually accorded to the term 'fixtures,' and that the rights of the parties are to be determined by the meaning of this term rather than by the meaning of the word fixtures. By the term improvements, however, not everything placed upon the property will pass to the owner on a retaking of possession after default. The term must mean improvements of the realty; that is to say, such things as are placed thereon by the way of betterments which are of a permanent nature and which add to the value of the property as real property. This would include buildings and structures of every kind, and also such machinery as was placed thereon of a permanent nature and which tended to increase the value of the property for the purposes for which it was used; in this instance, those things of a permanent nature which tended to increase the value of the property as a mine. Much can pass thereunder which, strictly speaking, cannot be denominated fixtures, and which in the absence of such a condition might be taken away.
>
> "Turning to the evidence, we find nothing which the court awarded the owners which cannot be said to be an improvement of the property. It must be borne in mind that this is a mining property, having no value over and above the surrounding property unless the ores it contains can be extracted from it. To extract these ores profitably and successfully machinery of the sort here in question is an essential. It is all attached to

> the realty; is fixed in place and permanent in the sense that it can remain so attached and fixed until destroyed by the elements or worn out by use. Plainly, we think, these articles are improvements of a permanent nature, which enhance the value of the realty for the uses for which it is intended.
>
> "The authorities clearly distinguish between the word 'improvements' and the word 'fixtures', holding that under the former term much will pass which would be excluded under the latter."

In the case of *King v. Title Trust Co.*, 111 Wash. 508, 191 Pac. 748, it was held that an elevator installed in an apartment house became a part of the real estate, and subject to the claims of the mortgagee and lien claimants, even though the owner and the seller of the elevator had agreed that it was to be personal property until the purchase price had been paid.

In the case of *Reeder v. Hudson Consolidated Mines Co.*, 118 Wash. 505, 203 Pac. 951, it was held that a 10-stamp quartz mill and machinery belonging thereto, and an electric transformer, an electric motor and certain "T" rails located on mining property were part of the real estate, and that the lien of the holder of a mortgage on the real estate was superior to the claim of a creditor who had attached the property by virtue of a writ of attachment. In that case it was said:

> "In determining whether a chattel annexed to the freehold is a trade fixture or a part of the realty the principal inquiry is into the intent of the party making the annexation. This may sometimes be difficult, but, whatever may be the legal relation of the parties waging the controversy

where the intent is discovered it is generally controlling.

* * *

"In the present case, the evidence shows that the property in question was attached to the real estate as firmly as it appears to have been reasonably possible to attach it, and highly important, it was so attached by the owner himself. * * *. The presumption must be indulged in that they were attached by the owner with the intention to enrich the freehold. They were conveyed by a warranty deed by the owner, who had annexed them, the consideration for which deed was a real estate mortgage back that covered not simply the mining claims as such, but with the added words, 'together with all improvements'."

In *Hall v. Dare*, 142 Wash. 222, 252 Pac. 926, it was held that a flag pole 60 feet long and 9 inches in diameter was a fixture and a part of the real estate, and that the purchaser of the property at mortgage foreclosure sale obtained title to the flag pole, even though it could be removed without material injury. The court said:

"It is argued, however, that this flag pole was not physically attached to the realty. True, it was not attached in such a manner as to require the actual breaking of any material in order to remove it. * * *. However, we think not necessary that there should be such an absolute physical attachment or holding of the pole to the realty to make it a part thereof, in view of its size, its general character ,the permanent nature of the foundation and anchor blocks specially constructed for the holding of it, and such construction and erection of the pole having been done by the owner of

> both the realty and the pole at the time of such construction and erection. It seems to us that if the holding of the pole in place was by gravity alone, so that it could have been removed by merely lifting it out of its position without the loosening of any of its holdings, it should still be regarded as attached to the realty."

In the case of *Nearhoff v. Rucker*, 156 Wash. 621, 287 Pac. 685, it was held that a monorail installed in a building to carry lumber from the mill and deposit it in suitable places, together with the trolley and copper wire used in connection therewith, was a fixture, notwithstanding testimony that it has been so constructed that it might be taken out without injury to the property. In that case the court said:

> "We have many times held that, when the annexation of a fixture is made by the owner of the property, the presumption is that it was annexed with the intention of enriching the freehold * * *.
>
> "We are compelled to conclude that, under the evidence in this case which the jury were warranted in resolving in favor of respondents, there was actual annexation to the realty, or something appurtenant thereto; that there was application to the use or purpose with which that part of the realty was connected when so appropriated; and that the intention of the party making the annexation, who was the then owner of the major part of the premises and that part to which the annexation was made, was to make a permanent annexation to the freehold."

In the case of *Strong v. Sunset Copper Co.*, 9 Wn. (2d) 214, 114 P.(2d) 526, suit was brought to foreclose a real estate and chattel mortgage. It was held

that certain lien creditors had priority so far as any chattels were concerned, for the reason that no affidavit of renewal of the chattel mortgage had been filed as provided by law; however, the court held that most of the items referred to in the chattel mortgage constituted fixtures, and that the claim of the mortgagee was prior to the lien of the other creditors as to that portion of the equipment which constituted fixtures. The court said:

> "The final question to be disposed of is that of whether certain items of equipment covered by the mortgage are chattels or fixtures. * * *.
>
> "* * * Practically all of the equipment which is the subject of dispute was bolted to specially prepared concrete foundations. While it is true, as respondents point out, that most of that equipment was of a stock nature, and could be removed by the mere unscrewing of foundation bolts, those two facts are not determinative of the particular issue. The evidence amply discloses that the equipment in question was intended to constitute permanent improvements, and accordingly, they constitute a part of the realty. They are fixtures, not chattels."

While the case of *Forman v. Columbia Theatre Co.*, 20 Wn.(2d) 685, 148 P.(2d) 951, was one in which the relationship of landlord and tenant was involved, rather than vendor and vendee, or mortgagor and mortgagee, the lease involved therein contained a provision that at the expiration of the lease the tenant "will leave on said premises all permanent improvements and repairs made during the term." The court affirmed a judgment awarding to the landlord certain conduits and wiring, switches, switch boxes, signs, and

other articles of improvement placed in the theatre building. In that case the court said:

> "In this connection, it must be borne in mind that all of the contested items were put upon the premises by the Columbia Theater Company prior to June, 1936, which was during the time the company was in possession of the premises under the lease agreement. It must be presumed that the annexations were made with the above-quoted clause ten in mind, which provided that all permanent improvements would be left upon the premises at the expiration of the lease." * * *
>
> "It is the conceded rule that whether or not the property annexed to the freehold becomes a part of the realty depends upon the intention of the party making the annexation. *Strong v. Sunset Copper Co.*, 9 Wn.(2d) 214, 114 P.(2d) 526, 135 A.L.R. 423. The theater building owned by respondents was rented for one purpose—the operation of a motion picture theater. The improvements and additions were made for the sole purpose of improving the building for that purpose. The new wiring, the Ozite soundproofing on the walls were merely for the purpose of making the building suitable for the showing of sound pictures. The portion of the wiring which is not imbedded in the walls and floors is attached to the walls by straps which are nailed to the walls. The Ozite is glued to the wall, and the urinal is cemented into the wall and floor. These items definitely 'savor of realty', to use the expression of the *Keller* case, *supra*. This applies to the electric sign, the false ceiling on the marquee, the reader boards attached thereto. All are physically attached to the building, and the ease or hardship incident to removing them is immaterial."

In the case of *Westinghouse Co. v. Hawthorne*, 21 Wn.(2d) 74, 150 P.(2d) 55, it was held that certain electric wiring, wire holders, ells, conduits, switches, pushbuttons, line starters and heaters, entrance caps, gaskets and covers, copperweld ground rods, carriage bolts, pulleys, together with motors and siding rails, used in the course of alteration and improvement of a building, constituted fixtures, and that the one who furnished these items was entitled to a mechanic's lien on the real estate. The court said:

> "Considering the question of the intention of the party making the annexation, this court, in the case of *Washington Nat. Bank v. Smith*, 15 Wash. 160, 45 Pac. 736, said: 'That the intention with which machinery is placed upon the real estate is one of the elements to be taken into consideration in determining whether or not it remains a chattel or becomes a part of such real estate is conceded, but it does not follow that such intention can be shown by testimony as to the actual state of the mind of the person who attached the machinery to the real estate at the time it was attached. On the contrary his intention must be gathered from circumstances surrounding the transaction and from what was said and done at the time, and cannot be affected by his state of mind retained as a secret.'
>
> "Upon this same subject, in the later case of *Ballard v. Alaska Theatre Co.*, 93 Wash. 655, 161 Pac. 478, this court said:
>
> " 'The intent is not to be gathered from testimony of the actual state of mind of the party making the annexation * * * but is to be inferred, when not determined by an express agreement,

from the nature of the article affixed, the relation and situation to the freehold of the party making the annexation, the manner of the annexation, and the purpose for which it is made.'

"In the case at bar, the appliances were ordered by a conditional vendee, the predecessor in interest of respondents, whose intention to enrich the freehold may be assumed, other requirements being proven."

In *Strain v. Green*, 25 Wn.(2d) 692, 172 P.(2d) 216, the court held that a chandelier and side lights annexed to the ceilings in a house, and mirrors attached to plywood backing, were fixtures and a part of the real estate. In that case the owners of the property testified that they never had any intention that the chandelier, side lights and mirrors should become fixtures, and that they had removed them as personal property from the former houses in which they had lived. However, the court said:

"It has never been the law of this jurisdiction, nor, we think, of any other, that the secret intention of the owner who affixed the disputed article, of itself, determines whether or not it was a fixture or a mere personal chattel." * * *

"Respondents in this case were owners when they installed the articles in question. The presumption, then, is (as held in the last of the quotations hitherto made from *Ballard v. Alaska Theatre Co., supra*) that it was their intention to enrich the freehold. This presumption is not overcome by evidence of secret intention, as is shown by the first of the quotations hitherto made from the same case, and then more plainly by the other quotation to the same effect from *Washington*

*Nat. Bank v. Smith*, supra. Nor is the fact that the respondents successfully removed the articles from house to house of much, if any, probative value."

In 36 C.J.S., Fixtures, Sec. 43, it is said:

"* * * In deciding whether an article used in connection with real property should be considered as a fixture and a part and parcel of the land, as between a mortgagor and mortgagee or vendor and purchaser of the land, the usual tests are real or constructive annexation of the article to the realty; appropriation or adaptation to the use or purpose of the realty with which it is connected; and the intention to make the annexation permanent. The manner of annexation of chattels to realty is not controlling on the question as to whether they constitute fixtures, but the purpose and intent of annexation are the most important considerations.

"The rule for determining what is a fixture is construed strongly against the mortgagor or vendor and in favor of the mortgagee or purchaser * * *. Many chattels are held to be fixtures, as between mortgagor and mortgagee or vendor and purchaser, which do not lose their character of personal chattels when the question is between landlord and tenant."

In the case of *re Theodore A. Kochs Co.*, 120 F.(2d) 603, 136 A.L.R. 1280, the court said:

"It is presumed without more, when machinery is installed which is indispensable to the operation of a factory, that the owner intended to affix the machinery permanently to the premises. In our case, the nature of the machinery, the manner of

its attachment, its essential relation to the business, and the fact that the annexor owned both the plant and the machinery are manifestations that at the time of the installation the annexor intended the machinery to constitute a permanent improvement of the realty. Unquestionably, in such a situation, the case-law is that the machinery becomes part of the realty and passes with it under a real estate mortgage. [Citing cases.] It is true that the machinery in question was not an integral part of the permanent buildings and was removable without injury to the freehold, but these circumstances do not militate against the conclusion that at the time of installation the machinery and plant were a single whole in the contemplation of the law."

As to those items of property which are not physically attached to the property or the building, but are used in connection with the operation of the machinery and fixtures which are annexed, the rule is stated in 109 A.L.R. 1424 as follows:

"It has been held that where the principal part of machinery is a fixture due to actual annexation to the realty, the parts of it, although not actually annexed to the freehold, are fixtures where they would, if removed, leave the principal part unfit for use, and where of themselves they are not capable of general use elsewhere * * *.

"In numerous cases, machinery and articles of various kinds used in factories, mills, etc., have been held to constitute fixtures because of their relation to or employment in connection with other machinery or apparatus which was unquestionably fixtures, or because of their essential nature as a part of the plant."

## II.

### There Was No Severance of the Fixtures and Improvements from the Real Estate.

It was the opinion of the Referee-Special Master, and apparently also of the District Court, that notwithstanding the well established law as to fixtures as hereinbefore set out, the following circumstances resulted in the property claimed by appellant being personal property, instead of fixtures and improvements to the real estate:

(1) The deed to Puget Sound Products Company (Exhibit 3, Tr. 83 to 86), after the description of the real estate, contained the following paragraph:

> "Party of the first part further conveys and quit claims to party of the second part, its successors and assigns, all interest in the following described personal property, machinery and equipment:"

and listed as such "personal property, machinery and equipment," the cranes, transformers, switchboard, air compressor, and auxiliary fire pump, which are claimed by appellant.

(2) The Puget Sound Products Company, at the time the property was acquired, executed and delivered to the Reconstruction Finance Corporaton a chattel mortgage upon this property, to secure a promissory note (Exhibits 8 and 9, Tr. 155 to 163).

(3) Thereafter, the Puget Sound Products Company included this property in chattel mortgages given to the Seattle Association of Credit Men (Exhibit 10, Tr. 168 to 173), and to United States Sheetwood Company (later assigned to W. L. Grill) (Tr. 250 to 253).

So far as the chattel mortgages to Seattle Association of Credit Men and to W. L. Grill are concerned, these were executed subsequent to the real estate mortgage under which the appellant acquired title, and could have no bearing upon the question as to whether the property covered thereby constituted fixtures as against one acquiring title by the mortgage foreclosure. The giving of these mortgages might effect a constructive severance of the fixtures therein described from the real estate so far as the mortgagees were concerned, but no severance could be effective as against the prior rights of the holder of the real estate mortgage.

The fact that the deed for the real estate (Exhibit 3, Tr. 83 to 86) particularly described certain items of property located in the building on the premises, and referred to them as "personal property, machinery and equipment," would not have the effect of severing any of the property therein described from the real estate, if it was in fact a part of the real estate, particularly where the Purchase Money Mortgage taken at the time covered the real estate "together with the building, structures and improvements thereon." It is not unusual for items, constituting fixtures, to be referred to separately in a deed — very often deeds include specific reference to furnaces, plumbing, light fixtures, window shades, and other items of property, which already constitute part of the real estate, and certainly the including of such items neither severs from the real estate any articles which are in fact fixtures, nor makes a part of the real estate any items which are in fact personal property.

While it was not specifically referred to in the Referee-Special Master's memorandum decision herein nor in the Findings of Fact, we believe that the strongest argument in favor of the proposition that the items of property were severed from the real estate is the fact that the Reconstruction Finance Corporation took a chattel mortgage from the Puget Sound Products Company upon the cranes, transformers, switchboard, air compressor and auxiliary fire pump, together with other property (Exhibit 9, Tr. 159 to 163). The giving and acceptance of this chattel mortgage, in our opinion, constituted a severance of these items from the real estate, and made them personal property, *insofar as the chattel mortgage was concerned, but only for the purpose of the mortgage.* When the mortgage was paid and released, the property covered thereby resumed its original status as fixtures annexed to the land.

The case of *Parrish v. Southwestern Washington Production Credit Association*, 41 Wn.(2d) 586, 250 P.(2d) 973, decided December 4, 1952, is exactly in point so far as this question is concerned. In that case Rolla Parrish and Miriam Parrish, his wife, for several successive years, had given to Southwestern Washington Production Credit Association chattel mortgages covering many articles of machinery and equipment located upon a cranberry farm (known as cranberry bog). Rolla Parrish and Miriam Parrish were divorced, and the real estate was deeded to Rolla Parrish, who gave to Miriam Parrish a mortgage covering the real estate, together with the appurtenances and fixtures. Rolla Parrish continued to operate the farm, and in order to finance such operation gave to the

Production Credit Association chattel mortgages covering the same property as had been included in the mortgages given during the preceding years, including sprayer, pumps, motors, transformers and electrical equipment. Suit was brought by Miriam Parrish to foreclose her real estate mortgage, and the Production Credit Association alleged that the lien of its chattel mortgages was prior to the claim of the plaintiff. The court found:

> "* * * That the watering and sprinkling system, including pipe lines consisting of trunk lines and lateral pipe lines, sprinkler heads, pumps, motors, frames, power poles and wiring and transformers, constitutes an integrated system installed with the intention of making a permanent improvement to the property, actually annexed to the realty, and designed and constructed to make the particular land a commercial cranberry bog * * *."

The Supreme Court, after citing cases heretofore set out in this brief, said:

> "Applying these principles to the established facts of this case, we conclude that the trial court did not err in holding that the items were fixtures within the provisions of respondent's real estate mortgage.
>
> "Appellant contends, however, that even if it should be determined that the chattels would ordinarily be fixtures, respondent cannot now be heard to make that contention. Appellant bases this argument on the fact that respondent had previously joined in executing chattel mortgages on the identical items of property, thereby declaring them to be personalty. In the words of appellant, as stated in its brief:

> "'* * * having once intended that they should be chattels, the respondent cannot now be heard to say that they are fixtures'."

After quoting from the case of *Planter's Bank v. Lummus Cotton Gin Co.*, 132 S.C. 16, 128 S.E. 876, 41 A.L. R. 592, and from 36 C.J.S. 920, Fixtures, Sec. 13, the decision of the Supreme Court continues as follows:

> "Although the foregoing authorities refer to a vendor-vendee relationship, we feel that the reasoning expressed applies with equal force to the factual situation involved here, and hold that, upon satisfaction of the mortgages, any right which the appellant may have had to contend that the items were personalty, was extinguished. As between appellant and Rolla and Miriam Parrish, *upon satisfaction of the chattel mortgages, the machinery and equipment involved lost their status as chattels and resumed their original status as fixtures annexed to the land.*" (Italics ours)

The chattel mortgage which was given by the Puget Sound Products Company to the Reconstruction Finance Company covering the fixtures in this case was fully paid and released, and the potential severance of the fixtures from the land (which would have become an actual severance if the chattel mortgage had been foreclosed) was extinguished, and the property resumed or retained its status as fixtures and a part of the real estate.

## III.

**Appellant's Claim for Rent Was Clearly Established by the Evidence.**

The mere statement of the case in regard to the claim of Nelse Mortensen & Co., Inc., for reasonable rent, clearly establishes its right thereto. The Trustee remained in possession of the real estate at all times between November 5, 1951, and September 1, 1952. The undisputed testimony was to the effect that $400.00 per month was the reasonable rental value of the real estate (Tr. 300, 307).

The claim that Mortensen had agreed to allow six months free rent to the Puget Sound Products Co. was not established by the evidence, and the burden of proving such claim was upon the respondent. All negotiations and conversations testified to in an attempt to establish such an agreement were predicated upon Nelse Mortensen & Co., Inc., buying the property from the Puget Sound Products Co. It was found to be impossible to obtain title in this way, and the negotiations were dropped. It then became necessary for Mortensen to buy the right to redeem from the Seattle Association of Credit Men, Inc., and pay $750.00 therefor. Neither was there any consideration for any alleged promise to allow free rent, and no contract was made to that effect.

## CONCLUSION

We respectfully submit that the record in this case established that all of the property claimed by appellant is a part of the real estate owned by it, and that the order of the District Court denying its claim there-

to should be reversed, and the said property adjudged to be the property of appellant.

The order denying and disallowing appellant's claim for reasonable rent should also be reversed, and the claim allowed in the amount of $400.00 per month from November 5, 1951, to September 1, 1952.

Respectfully submitted,

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